Kolonel Dr Faiz Azraai bin Abdul Aziz v Mahkamah Tentera Divisyen Keempat Infantri Malaysia

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-5–02 OF 2022(W)
TENGKU MAIMUN CHIEF JUSTICE, MOHAMAD ZABIDIN AND MARY LIM FCJJ
16 MAY 2023

Armed Forces — Desertion — Proof of intention to remain permanently absent — Army doctor ('appellant') who had been absent from work without leave for more than six months reported back to work after he was released from detention by Military Police who had arrested him — Appellant was subsequently court-martialled on charge of desertion, found guilty, sentenced to jail term and dishonourably discharged from Army — Whether prosecution had failed to prove that appellant had the intention to remain permanently absent from his duties — Whether charge of desertion had therefore not been proven — Whether Military Court ('MC') was wrong to infer appellant intended to remain permanently absent from his duties based simply on his long period of absence from work — Whether MC erred in finding that had appellant not been arrested, he would not have returned to work — Armed Forces Act 1972 ss 54(1)(a) & 54(2)(a)

The appellant, whose last posting was as an anesthetist at the Tuanku Mizan Army Hospital in Kuala Lumpur, went absent without leave ('AWOL') from 19 October 2016 onwards. More than six months later, on 4 May 2017, the appellant was arrested and detained by Military Police who brought him before a magistrate four days later. The magistrate ordered the appellant to be released as his arrest did not comply with procedure under the Armed Forces Act 1972 ('the AFA'). Hours after his release, the appellant donned his uniform and returned to his work-station at the Tuanku Mizan Army Hospital but he was placed in the 'Jabatan Am'. Three months later, on 4 August 2017, the appellant was court-martialled for committing desertion under s 54(1)(a) read with s 54(2)(a) of the AFA. The respondent found him guilty, sentenced him to three months' jail and dishonourably discharged him from the Army ('the decision'). The appellant's application for a review of the decision under s 128 of the AFA failed. He then filed judicial review ('JR') proceedings in the High Court to quash the decision on the ground that he was only guilty of going AWOL, an offence under s 55 of the AFA, and not of desertion. The High Court dismissed the JR application and held that: (a) the authorities had the discretion under the AFA to decide whether to charge the appellant for desertion or for going AWOL; and (b) the charge of desertion was proven and the conviction was not erroneous as the appellant's long period of absence from

work was sufficient to give rise to the inference that he intended to desert; that there was no evidence to show that he intended to return to work and that if not for his arrest, he would not have done so. The Court of Appeal ('COA') upheld the decision. The Federal Court granted the appellant leave to appeal. One of the questions of law ('the third leave question') on which leave to appeal was granted was whether the act of going AWOL for more than six months was sufficient in itself, without more, to constitute the offence of desertion under the AFA.

Held, unanimously allowing the appeal, answering the third leave question in the negative, setting aside the orders of the courts below and granting the order of certiorari sought by the appellant in his JR application:

(1) Whilst the courts generally refrained from examining the merits of proceedings in quasi-judicial or disciplinary tribunals including the decisions of military courts or in matters of military law — where matters of discipline were best left to the military itself — there were exceptional circumstances where curial intervention was warranted and justified, such as the instant case where the complaint was not about compliance or non-compliance with procedure but that the charge against the appellant was defective, erroneous and illegal. This was a matter of substantive law, especially of criminal justice, and the courts had every jurisdiction and duty to intervene, more so when the fundamental rights of the appellant as a military officer were alleged to have been infringed or imperilled; rights such as his right to livelihood as enshrined in art 5 of the Federal Constitution (see paras 21, 24, 26 & 32).

(2) The intention to remain permanently absent from duty was the critical element in the form of desertion under s 54(2)(a) of the AFA. The offence of being absent without leave (AWOL) under s 55 of the AFA, on the other hand, did not require the establishment of an intention to remain permanently absent from duty. The charge of desertion against the appellant fell under s 54(1)(a) read with s 54(2)(a) of the AFA. Hence, the burden was on the prosecution to prove that the appellant had the intention to remain permanently absent from duty. It was not for the appellant to prove that he did not have such an intention. The High Court, therefore, erred in finding that there was no evidence to show that the appellant intended to return to duty before he was arrested by the Military Police (see paras 30 & 33).

(3) The prosecution never established that the appellant intended to remain permanently absent from his duties. Instead, it chose to invite the respondent to infer that intention based on the appellant's continuous period of absence, suggesting that but for his arrest, the appellant would

never have returned to work. The respondent accepted this and found the appellant guilty as charged by inference. This was highly erroneous (see para 37).

(4) Since the prosecution had no direct evidence of the appellant's intention to desert, it was a rule of essential justice that the intention to desert should have been put to the appellant when he was cross-examined. Since no questions were asked of the appellant relating to or for the purpose of establishing such intention, the respondent was in no position to draw any inference, let alone a reasonable inference, of a positive intention to desert. It was further unclear whether the intention to desert subsisted at the time of the appellant's leaving or was only formed subsequently. In a charge as serious as desertion, which carried not only the punishment of imprisonment but a dishonourable discharge from His Majesty's Service, clear and precise findings should have been made and not guesswork (see paras 38 & 42–43).

(5) The charge of desertion against the appellant under s 54(1)(a) read with s 54(2)(a) of the AFA was clearly not made out and the respondent's decision was unsustainable in law and had to be quashed (see para 44).

[Bahasa Malaysia summary

Perayu, yang jawatan terakhirnya sebagai pakar bius di Hospital Tentera Tuanku Mizan di Kuala Lumpur, tidak hadir tanpa cuti ('AWOL') mulai 19 Oktober 2016 dan seterusnya. Lebih enam bulan kemudian, pada 4 Mei 2017, perayu telah ditangkap dan ditahan oleh Polis Tentera yang membawanya ke hadapan majistret empat hari kemudian. Majistret memerintahkan perayu dibebaskan kerana penahanannya tidak mematuhi prosedur di bawah Akta Angkatan Tentera 1972 ('AAT'). Beberapa jam selepas dibebaskan, perayu memakai pakaian seragamnya dan kembali ke stesen kerjanya di Hospital Tentera Tuanku Mizan tetapi beliau ditempatkan di 'Jabatan Am'. Tiga bulan kemudian, pada 4 Ogos 2017, perayu telah dibawa ke mahkamah tentera kerana meninggal tugas di bawah s 54(1)(a) yang dibaca bersama s 54(2)(a) AAT. Responden mendapati beliau bersalah, menjatuhkan hukuman penjara tiga bulan dan memberhentikan beliau daripada Tentera secara tidak hormat ('keputusan tersebut'). Permohonan perayu untuk semakan keputusan tersebut di bawah s 128 AAT gagal. Beliau kemudiannya memfailkan prosiding semakan kehakiman ('SK') di Mahkamah Tinggi untuk membatalkan keputusan tersebut atas alasan bahawa beliau hanya bersalah kerana AWOL, satu kesalahan di bawah s 55 AAT, dan bukannya meninggalkan tugas. Mahkamah Tinggi menolak permohonan SK dan memutuskan bahawa; (a) pihak berkuasa mempunyai budi bicara di bawah AAT untuk memutuskan sama ada untuk mendakwa perayu atas meninggalkan tugas atau AWOL; dan (b) tuduhan meninggalkan tugas telah dibuktikan dan sabitan tersebut tidak salah kerana tempoh ketidakhadiran yang lama perayu dari tugas adalah mencukupi untuk menimbulkan inferens

bahawa beliau mempunyai niat meninggalkan tugas; bahawa tidak ada bukti yang menunjukkan bahawa beliau berhasrat untuk kembali bertugas dan jika tidak kerana penahanannya, beliau tidak akan berbuat demikian. Mahkamah Rayuan ('MR') mengekalkan keputusan tersebut. Mahkamah Persekutuan memberi kebenaran kepada perayu untuk merayu. Salah satu persoalan undang-undang ('soalan kebenaran ketiga') di mana kebenaran merayu telah diberikan adalah sama ada tindakan AWOL selama lebih daripada enam bulan sudah memadai, tanpa lebih, untuk membentuk kesalahan meninggalkan tugas di bawah AAT.

Diputuskan, sebulat suara membenarkan rayuan, menjawab soalan kebenaran ketiga secara negatif, mengetepikan perintah Mahkamah di bawah dan memberikan perintah certiorari yang dimohon oleh perayu dalam permohonan SK-nya:

(1) Walaupun mahkamah secara amnya mengelak daripada memeriksa merit prosiding dalam tribunal separa kehakiman atau tatatertib termasuk keputusan mahkamah tentera atau dalam hal undang-undang ketenteraan — di mana perkara disiplin sebaiknya diserahkan kepada tentera sendiri — terdapat keadaan luar biasa. di mana campur tangan pembaikan adalah wajar dan dibenarkan, seperti kes semasa di mana aduan tersebut bukan mengenai pematuhan atau ketidakpatuhan prosedur tetapi bahawa pertuduhan terhadap perayu adalah cacat, salah dan menyalahi undang-undang. Ini adalah soal undang-undang substantif, terutamanya keadilan jenayah, dan mahkamah mempunyai setiap bidang kuasa dan kewajipan untuk campur tangan, lebih-lebih lagi apabila hak asasi perayu sebagai pegawai tentera didakwa telah dilanggar atau terancam; hak seperti haknya untuk menyara hidup seperti yang termaktub dalam perkara 5 Perlembagaan Persekutuan (lihat perenggan 21, 24, 26 & 32).

(2) Hasrat untuk kekal tidak hadir bertugas adalah unsur kritikal dalam bentuk peninggalan tugas di bawah s 54(2)(a) AAT. Kesalahan tidak hadir tanpa cuti (AWOL) di bawah s 55 AAT, sebaliknya, tidak memerlukan pembentukan niat untuk kekal tidak hadir bertugas. Pertuduhan peninggalan tugas terhadap perayu adalah di bawah s 54(1)(a) dibaca bersama s 54(2)(a) AAT. Oleh itu, bebanan terletak pada pihak pendakwaan untuk membuktikan bahawa perayu mempunyai niat untuk kekal tidak hadir bertugas. Ia bukan untuk perayu membuktikan bahawa beliau tidak mempunyai niat sedemikian. Oleh itu, Mahkamah Tinggi terkhilaf apabila mendapati tiada keterangan menunjukkan perayu berhasrat untuk kembali bertugas sebelum beliau ditangkap oleh Polis Tentera (lihat perenggan 30 & 33).

(3) Pihak pendakwaan tidak pernah membuktikan bahawa perayu berhasrat untuk kekal tidak hadir dalam tugasnya. Sebaliknya, ia memilih untuk

menawarkan responden untuk membuat kesimpulan bahawa niat berdasarkan tempoh ketidakhadiran perayu yang berterusan, mencadangkan bahawa bukan kerana penahanannya, perayu tidak akan kembali bertugas. Responden menerima ini dan mendapati perayu bersalah seperti yang didakwa secara inferens. Ini adalah khilaf (lihat perenggan 37).

(4) Memandangkan pihak pendakwaan tidak mempunyai keterangan secara langsung tentang niat perayu untuk meninggalkan tugas, ia adalah satu peraturan keadilan yang penting bahawa niat untuk meninggalkan tugas sepatutnya dikemukakan kepada perayu semasa beliau disoal balas. Memandangkan tiada soalan diajukan kepada perayu berkaitan atau untuk tujuan mewujudkan niat sedemikian, responden tidak berada dalam kedudukan untuk membuat sebarang inferens, apatah lagi inferens yang munasabah, tentang niat positif untuk meninggalkan tugas. Ia adalah tidak jelas lagi sama ada niat untuk meninggalkan tugas wujud pada masa perayu pergi atau hanya dibentuk selepas itu. Dalam pertuduhan yang serius seperti peninggalan tugas, yang membawa bukan sahaja hukuman penjara tetapi pemberhentian tugas secara tidak terhormat daripada Perkhidmatan Baginda, dapatan yang jelas dan tepat sepatutnya dibuat dan bukan tekaan (lihat perenggan 38 & 42–43).

(5) Pertuduhan meninggalkan tugas perayu di bawah s 54(1)(a) yang dibaca bersama s 54(2)(a) AAT jelas tidak dibuktikan dan keputusan responden adalah tidak dapat dipertahankan di sisi undang-undang dan harus dibatalkan (lihat perenggan 44).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223, CA (refd)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Gobi a/l Avedian v PP [2021] 1 SLR 180; [2020] SGCA 102, CA (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 1 MLJ 563, FC (refd)
Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor [1997] 1 MLJ 562; [1997] 2 CLJ 752, CA (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647, CA (refd)
Muhammad Nabill bin Mohd Fuad v PP [2020] SGCA 25, CA (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443; [2019] 4 CLJ 561, FC (refd)
Peter Chong Ngen Onn & Ors v Col Adam bin Abu Bakar & Ors [1977] 2 MLJ 142, FC (refd)

A *PP v Lin Lian Chen* [1992] 2 MLJ 561, SC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
R v Mahoney [1956] 3 All ER 799 (refd)
R v Secretary of State for War; Ex parte Martyn [1949] 1 All ER 242, KBD (refd)
B *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49, CA (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356, FC (refd)
C *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, FC (refd)
The King v The Army Council, ex parte Ravenscroft [1917] 2 KB 504 (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
D

Legislation referred to

Armed Forces Act 1972 ss 54(1)(a), (2), (2)(a), (2)(b), 55, 98, 125, 174(4), 128
E Federal Constitution arts 5, 145, 145(3)

Appeal from: *Kolonel Dr Faiz Azraai bin Abdul Aziz lwn Mahkamah Tentera Divisyen Keempat Infantri Malaysia* [2022] 4 MLJ 970 (Court of Appeal, Putrajaya)

F

Cecil Wilbert (with Mohanaraj Abaraham, Muhammed Nasser bin Yusuf, Rishwant Singh a/l Amarjeet Singh, Mugunthan a/l Vadiveloo, Rejinder Singh a/l Gurdev Singh and Koh Wei Xian) (The Law Chambers of Fauzi & Nasser) for the appellant.
G *Ahmad Hanir Hambaly @ Arwi (with Noor Atiqah bt Zainal Abidin) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

Mary Lim FCJ (delivering judgment of the court):

H **[1]** There is a world of difference between being absent without leave ('AWOL') from your station or post, and being a deserter. In the armed forces, whether navy, army or air, it is a question of honour.

[2] In this appeal, the appellant was court-martialled and found guilty for
I the offence of desertion under s 54(1)(a) of the Armed Forces Act 1972 (Act 77) by the respondent. He was sentenced to three months imprisonment and dishonourable discharge from His Majesty's service. The appellant challenged the respondent's decision by way of judicial review proceedings. He was unsuccessful at both the High Court and the Court of Appeal.

[3] On 14 February 2022, the Federal Court granted leave on three questions of law.

[4] On 20 September 2022, we unanimously allowed his appeal; answering the third question posed, in the negative. That answer was sufficient reason for us to allow the appeal in which case the remaining two questions need not be answered. The three questions of law which generally revolve around the interpretation of s 54(1)(a) and 54(2)(a) of Act 77 are:

(1) *bolehkah seorang tentera yang telah kembali melapor diri dan bertugas secara aktif selepas satu tempoh cuti yang tidak dibenarkan dituduh atas kesalahan tinggal tugas mengikut s 54(1)(a) Akta Angkatan Tentera 1972 (Akta 77)?* (can a soldier who has returned to active service after a period of unsanctioned leave be subsequently charged for desertion within the meaning of s 54(1)(a) of the Armed Forces Act 1972 (Act 77)?);

(2) *bolehkah seorang tentera yang kembali melapor diri dan bertugas semula selepas satu tempoh cuti yang tidak dibenarkan dikatakan mempunyai niat untuk meninggalkan tugas buat selama-lamanya sepertimana yang diperuntukkan mengikut s 54(2)(a) Akta Angkatan Tentera 1972 (Akta 77)?* (can a soldier who re-joined active service after a period of unsanctioned leave intend to be remained permanently [sic] absent from his duty as provided under s 54(2)(a) of the Armed Forces Act 1972 (Act 77)?); and

(3) *bolehkah perbuatan tidak hadir tanpa cuti selama enam bulan dikatakan telah cukup memenuhi kehendak elemen 'meninggalkan atau tidak masuk atau tidak masuk semula dalam Perkhidmatan Seri Paduka Seri Baginda ataupun yang terbentuk kemudiannya, hendak meninggalkan kewajipan buat selama-lamanya' seperti yang diperuntukkan mengikut s 54(2)(a) Akta Angkatan Tentera 1972 (Akta 77)?* (can an unsanctioned absence from duty for six months be sufficient to satisfy the element of leave His Majesty's Service if fails [sic] to re-join His Majesty's Service, with the intention of remaining permanently absent from this duty as stipulated under s 54(2)(a) of the Armed Forces Act 1972 (Act 77)?)

BACKGROUND

[5] The appellant, medically trained, commenced service in the armed forces on 2 April 2002. On 21 April 2015, he was promoted as a colonel. At the material time, the appellant was posted as an anaesthetist at Hospital Tentera Tuanku Mizan, Kuala Lumpur.

[6] From 19 October 2016 to 4 May 2017, the appellant was absent from work without leave. On 4 May 2017, he was arrested by the military police at

a car park in Section 13, Shah Alam, Selangor. He was produced before the magistrates court on 8 May 2017. He was, however, released because the arrest was contrary to the procedure in s 174(4) of Act 77.

[7] Later that same day, at or about 3.30pm, the appellant put on his uniform and reported for work at his old station, Hospital Tentera Tuanku Mizan, Kuala Lumpur. He was, however, placed in 'Jabatan Am'.

[8] Three months later, on 4 August 2017, he was charged with the offence of desertion under s 54(1)(a) of Act 77 and the charge reads as follows:

> *PERTUDUHAN*
>
> *KOL (DR) FAIZ AZRAAI BIN ABDUL AZIZ (3009928)* Markas 11
>
> Briged, Kem Sungai Buloh, Selangor, seorang pegawai angkatan tetap yang tertakluk kepada Undang-Undang Perkhidmatan di bawah Seksyen 209(1)(a) Akta Angkatan Tentera 1972 adakah diperuntukan atas:
>
> *TINGGAL TUGAS YANG BERTENTANGAN DENGAN SEKSYEN 54(1)(a) AKTA ANGKATAN TENTERA 1972*
>
> Iaitu ia, di Hospital Tentera Tuanku Mizan, Kuala Lumpur, No. 3 Jalan 4/27A, Seksyen 2 Wangsa Maju, 53300 Kuala Lumpur *telah meninggalkan perkhidmatan Seri Paduka Baginda* mulai 19 Oktober 2016 jam lebih kurang 0930 hingga 04 Mei 2017 jam lebih kurang 1330 *dengan niat* pada masa meninggalkan atau ada niat kemudiannya *untuk tetap tidak hadir bertugas selama-lamanya*. (Emphasis added.)

[9] Amongst the defences raised by the appellant was that he was suffering from depression caused by stress both at the workplace and at home; that he was on medication which had the side-effect of him losing focus on his work. His applications for leave were also rejected.

[10] On 28 August 2017, the Military Court, the respondent, found the appellant guilty as charged and sentenced him to three months imprisonment and he was also dishonourably discharged from service (the impugned decision). The impugned decision was subsequently confirmed by the appellant's confirming officer on 18 October 2018 — see s 125 of Act 77.

[11] The appellant exercised his right of review under s 128 of Act 77 but was unsuccessful. He then initiated judicial review proceedings seeking to quash the impugned decision on grounds of defective and legally erroneous charge, that the proper charge was one under s 55 of Act 77; that the respondent had exceeded its jurisdiction when it did not have regard to the fact that the prosecution had failed to prove desertion under s 54(2)(a) or (b) under Act 77; and to have regard to relevant matters. Although he succeeded in obtaining leave, the appellant failed on the merits.

DECISIONS OF THE HIGH COURT AND THE COURT OF APPEAL

[12] The High Court disagreed with the appellant, finding as follows:

(a) the authorities had the discretion under s 98 of Act 77 to decide on the appropriate charge, whether for desertion or for AWOL;

(b) the charge for desertion was proved because the appellant was indeed absent without leave;

(c) because the period of absence was substantial, it was correct for the respondent to conclude that there was evidence of desertion; and

(d) the conviction was not erroneous since there was no evidence of intention on the part of the appellant to return or resume duty/service.

[13] The learned judge added that it was reasonable to infer that the appellant had every intention to desert 'berniat untuk meninggalkan perkhidmatan buat selama-lamanya' because if the appellant had not been arrested, he would not have returned to work.

[14] The learned judge further held that the presence of the word 'or' in s 54(2)(a), meant that the offence of desertion is proved once the prosecution has shown that the appellant had left the service. The element of 'remaining permanently absent from his duty' is satisfied once it has been proved that the person or officer has left the service. More importantly, the learned judge held that there was no requirement to prove intention to remain permanently absent from duty, suggesting that this element was only required where the charge was for leaving the service and not re-joining the service.

[15] The Court of Appeal agreed with the High Court on all fronts. At para [26], the decision of *R v Mahoney* [1956] 3 All ER 799 was cited in support, both factually and for the legal principles propounded; and then applied to the particular facts in the appeal.

[16] The Court of Appeal found that from the evidence adduced in the records of appeal, there was no error on the part of the respondent when it ruled that a prima facie case had been established and the appellant was required to enter his defence to the charge under s 54(1)(a). Further, the respondent was entitled to infer from the absence of six months 25 days without leave that the appellant had no intention to return to work.

[17] The respondent's decision was also said to 'tidak dicemari dengan kekhilafan undang-undang, tidak rasional atau berlakunya ketidakpatuhan prosedur'; that 'Dapatan responden yang mendapati perayu gagal

menunjukkan niat untuk kembali bertugas setelah mendengar keterangan pembelaan perayu adalah dapatan fakta yang biasanya tidak akan diusik di peringkat semakan kehakiman'. Citing this court's decision in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149, the Court of Appeal reasoned that the courts have 'limited powers over administrative determinations of public bodies and are constrained to confirm the findings of disciplinary hearings'; that the courts 'cannot introduce technicalities of a court of law to the disciplinary authority' as 'the courts do not normally regard it as their function to interfere with the findings of fact by the disciplinary authority'.

[18] The appellant's other complaints were also rejected by the Court of Appeal.

OUR ANALYSIS AND DETERMINATION

[19] We have no argument on the underlying principles engaged when the court is approached for the exercise of its supervisory jurisdiction, that the court does not sit on appeal. The well-settled principles apply regardless the underlying subject matter emanates from civil service conditions or from the military, navy or air force. But, it is one thing to cite these principles and quite another to recognise, appreciate and apply these principles in any given circumstances. Otherwise, these principles will only be cold piety to their true loftiness and meaning.

[20] In this appeal, the real question is in the third question of law for which leave was granted:

> Bolehkah perbuatan tidak hadir tanpa cuti selama enam (6) bulan dikatakan telah cukup memenuhi kehendak elemen 'meninggalkan atau tidak masuk atau tidak masuk semula dalam Perkhidmatan Seri Paduka Seri Baginda ataupun yang terbentuk kemudiannya, hendak meninggalkan kewajipan buat selama-lamanya' seperti yang diperuntukkan mengikut seksyen 54(2)(a) Akta Angkatan Tentera 1972 [Akta 77]?
>
> Can an unsanctioned absence from duty for six (6) months be sufficient to satisfy the element of leave His Majesty's Service if fails [sic] to re-join His Majesty's Service, with the intention of remaining permanently absent from this duty as stipulated under Section 54(2)(a) of the Armed Forces Act 1972 [Act 77]?

[21] The complaint of the appellant is that the sole charge against him under s 54(2)(a) is defective, legally erroneous and cannot be sustained in law and on the facts. While the courts generally refrain from examining merits of proceedings in quasi-judicial or disciplinary tribunals, there are exceptional circumstances and reasons why intervention is nevertheless warranted and justified. Our jurisprudence is replete with relevant case law — see for instance

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; and *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563.

[22] In this appeal, the exercise of examining a charge under the relevant law is far from being an intrusion into domestic inquiries and sitting as if on appeal. It is a question of law, very much within the ambit and allegations of illegality envisaged under the *Wednesbury* principles enunciated in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 and further developed in the locus classicus of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. These principles have been applied in our courts for a long, long while now — see for instance, *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] 4 CLJ 561 and more recently in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; and *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356 and where a more robust approach has since been adopted by our courts.

[23] In *Sundra Rajoo a/l Nadarajah*, though made in the context of the powers of the Attorney General under art 145 of the Federal Constitution, that 'while the AG/PP's powers are reviewable, the AG/PP's discretion under art 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny (see Chan Sek Keong CJ in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49), the following is no less a timely reminder about the role, function and powers of the courts, which we do not see watered down simply because we are faced with matters of military discipline:

> [97] Deference does not however translate to complete surrender. Ours is a system built on constitutional supremacy where accountability, separation of powers and Rule of Law take centre stage. Much headway has been made in our constitutional jurisprudence to curate the fine balance between policy considerations on the one side, and the adjudication and supervision of the legality of State action by the judicial branch — on the other. This gradual shift from unfettered discretion to restricted supervision is apparent from the judgment of this court in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] 4 CLJ 561.

[24] In the context of judicial review of decisions arising from military discipline, a careful read of the decision in *Peter Chong Ngen Onn & Ors v Col Adam bin Abu Bakar & Ors* [1977] 2 MLJ 142 illustrates that it was never the position in law that the courts will never intervene in decisions of the military courts or in matters of military law. We fully appreciate that matters of

discipline are best or better left to the military itself but that is not the same as saying that the courts have no jurisdiction in these matters. The authors of *Military Legal Proceedings in Malaysia*, Teo Say Eng and Colonel Wan Normazlan bin Che Jaafar (Lexis Nexis) explained the unique features of military discipline and why a higher degree of discipline is required in the armed forces:

> ..., the armed forces also have laws and regulations with their own system of administration which is known as the military legal system. It is a unique legal system which is created to enforce certain standards of behaviour and to maintain discipline in the armed forces. Discipline is the soul of the armed forces. It is the basis of all military efficiency. The military system establishes a separate system of military justice for members of the armed forces as distinct from criminal justice for the civilians. There are three main reasons for the existence of such separate system of military justice: one reason is that the need for swift and summary machinery for the maintenance of discipline; secondly, the adjudication of military crimes may require military expertise by the court and therefore the system requires that military offences should be tried by military personnel; thirdly, the armed forces which are stationed abroad, outside the jurisdiction of their country's civil courts are still subject to the jurisdiction of courts-martial.

[25] That need for higher discipline is understandable and makes logical sense. In fact, in Peter Chong, the Federal Court cited with approval a view of the Divisional Court in The *The King v The Army Council, ex parte Ravenscroft* [1917] 2 KB 504 a case where the complaint was of non-compliance of regulations made under the Army Act in the United Kingdom dealing with service of notices of inquiry to which Viscount Reading CJ opined that '... this is a military matter. The [applicant] was under military law ...'. It was in that respect that the view on non-interference was expressed. The Federal Court then went on to cite Lord Goddard CJ in *R v Secretary of State for War; Ex parte Martyn* [1949] 1 All ER 242, for the proposition that 'the court could only interfere with military courts and matters of military law insofar as the civil rights of a soldier may be affected ...'.

[26] The complaint in this appeal does not concern compliance or non-compliance of procedure; it is a complaint on the substance of the charge itself, that it is defective, erroneous and illegal. That is a matter of law, entirely within the purview of this court, more so when the fundamental rights of the appellant as a military personnel are alleged to have been infringed or imperilled; rights such as his right to livelihood as enshrined in art 5 of the Federal Constitution.

[27] Turning then to the charge. It is for an offence of desertion under s 54(1)(a) when, if at all, it ought to have been a charge of absence without leave under s 55. Both sections read as follows:

Section 54 Desertion

(1) Every person subject to service law under this Act who —

(a) *deserts*; or

(b) persuades, endeavours to persuade, procures or attempts to procure any person subject to service law under this Act to desert,

shall, on conviction by court-martial, be liable to imprisonment or any less punishment provided by this Act:

Provided that a person shall not be liable to be imprisoned for more than two years unless —

(i) if the offence was against paragraph (a), he was on active service or under orders for active service at the time when it was committed; or

(ii) if the offence was against paragraph (b), the person in relation to whom it was committed was on active service or under orders for active service at that time.

(2) For the purpose of this Act a person deserts who

(a) *leaves His Majesty's Service, or when it is his duty to do so, fails to join or rejoin His Majesty's Service, with (in either case) the intention, either subsisting at the time of the leaving or failure or formed thereafter, of remaining permanently absent from his duty;*

(b) absents himself without leave with intent to avoid serving at any place overseas or to avoid service or any particular service when before the enemy;

(c) in the case of sailor having been warned that his vessel is under sailing orders, is absent without proper authority, with intention of missing that vessel; or

(d) being an officer enlists in or enters any of the armed forces without having been relieved of his commission, or being a serviceman enlists in or enters any of the armed forces without having been discharged from his previous enlistment,

and references in this Act to desertion shall be construed accordingly.

(3) In addition to or in lieu of any punishment provided by subsection (1), the court-martial by whom a serviceman is convicted of desertion may direct that the whole or any part of his service previous to the period as respects which he is convicted of having been a deserter shall be forfeited. (Emphasis added.)

Section 55 Absence without leave

Every person subject to service law under this Act who —

(a) absents himself without leave; or

(b) persuades, endeavours to persuade, procures or attempts to procure any person subject to service law under this Act to absent himself without leave,

A shall, on conviction by court-martial, be liable to imprisonment for term not exceeding two years or any less punishment provided by this Act.

B **[28]** Act 77 defines what 'desertion' is in s 54(2). It envisages different scenarios when a person who is subject to service law may be said to have deserted His Majesty's service. First is where this person leaves the Service with the intention of remaining permanently absent from his duty. Second, is where he fails to join or re-join His Majesty's Service when he has a duty to join or re-join His Majesty's Service and he does so with the intention of remaining C permanently absent from his duty. This intention may either subsist at the time of leaving or formed later.

D **[29]** It is important to note that the intention relates not only to being absent from duty but a permanence in that absence. In other words, there is intention to stay away from His Majesty's Service, permanently; never to return to the Service.

E **[30]** This intention to remain permanently absent from duty is the critical element in the charge of desertion; that there is this intention to desert aside from the other element of leaving His Majesty's Service, which is quite apart from the intention to be absent. This element is vital to a charge for desertion and it becomes more apparent when the offence of desertion is contrasted with and distinguished from the offence of absence without leave, typically known by the moniker, 'AWOL', under s 55. The latter offence is not dependent on the F establishment of an intention to remain permanently absent from duty. It merely requires the prosecution to prove and the respondent to find an accused absent from duty and that the absence was without leave. This material difference between the two offences is further reflected in the severity of the punishment that is meted out: in the case of desertion, there may be a forfeiture G of service in addition to a term of imprisonment.

[31] It goes without saying that the burden lies with the prosecution or the respondent to prove all the elements of the charge; in particular that element of intention to remain permanently absent from duty or that intention to desert. H Learned senior federal counsel arguing for the respondent accepts this is the applicable principle of law. However, learned SFC urged this court to refrain from disturbing the decision of the respondent as this court has no jurisdiction to interfere with the respondent's findings of fact and matters of merit.

I **[32]** With respect, we must disagree with learned SFC. As we had said at the outset, this third question turns on a matter of substantive law, especially of criminal justice. In such matters, the courts have every jurisdiction and duty to intervene; not restricted to reviewing complaints of procedural non-compliance.

[33] For the purpose of this appeal, it is evident from the terms of the charge that the appellant is alleged to have committed desertion in the first sense as explained above; that he left His Majesty's Service with the intention of remaining permanently absent from his duty; and that intention either subsisted at the time of leaving or was formed subsequently. While the fact of not being present at work or duty is not in dispute, the existence of that requisite intention was very much in dispute. The duty was upon the prosecution to prove and for the respondent to properly and legally find that the appellant left His Majesty's Service with that requisite intention. It was not for the appellant to prove that he had the intention to remain or even an intention not to be permanently absent from duty (see *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647). It was thus erroneous of the High Court to find that there was no evidence to show that the appellant intended to return to duty before he was arrested by the military police.

[34] The presumption of innocence, a hallmark of criminal justice in a decent democracy is enjoyed by all persons including the appellant who are subject to service law. In matters of criminal justice, the same principles of proving offences apply. See for instance, *Lt Kol Yusof bin Abdul Rahman v Kol Anuar bin Md Amin & Anor* [1997] 1 MLJ 562; [1997] 2 CLJ 752 where one of the issues in contention was the meaning of prima facie case and the degree of proof required at the end of prosecution case.

[35] As indicated, the period of absence from duty, that is, from 19 October 2016 to 4 May 2017, is not denied. Although the reasons for such absence were offered by the appellant, they are irrelevant for the purpose of this question posed. What however, is also not in dispute is that the appellant reported back to work. That was on 8 May 2017, after his four days of incarceration by the military police when he was produced before the magistrates court. That detention was the subject matter of a separate civil suit and for which the respondent paid the appellant, compensation. After his release in court, the appellant reported for duty at Hospital Tentera Tuanku Mizan, attired in his uniform. He was put in the 'pool', 'Jabatan Am'.

[36] The appellant argued that while it may be said that he had been absent from duty without authorisation, it cannot be suggested that he had the intention to remain permanently absent from his duty. This was reflected by his return to duty, be it on 4 May 2017 when he was arrested by the military police, or voluntarily on 8 May 2017 after his release by the magistrates court; and by the acceptance of his return to duty by the respondent when he was placed in Jabatan Am.

[37] We agree. The prosecution never established the actual presence of this element of intention to remain permanently absent from duty, an element

which is absolutely vital and critical to the charge of desertion under s 54(1)(a) with desertion as defined in s 54(2). It chose instead to invite the respondent to infer that the intention to desert was evidenced by the continuous period of absence, suggesting that but for his arrest, the appellant would never have returned to duty. The respondent accepted this and found the appellant guilty as charged by inference. We find this highly erroneous.

[38] Bearing in mind that it was for the prosecution team to prove the presence of intention to desert, whether this intention subsisted at the time of leaving or was formed later, it was incumbent upon the prosecution to lead evidence to establish that intention. Since it did not have any direct evidence, it is a rule of essential justice that this critical element of intention to desert must be put to the appellant at the time when he was cross-examined.

[39] The line of authorities evidencing this proposition is frequently cited in relation to the defence case. The principle is equally applicable to the prosecution. See *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] SGCA 25; and *Gobi a/l Avedian v Public Prosecutor* [2021] 1 SLR 180; [2020] SGCA 102. In *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561, the Supreme Court held:

> Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticized for keeping his defence 'up his sleeve' so to speak, and it being branded as a recent invention.

[40] Then, there is the seminal decision in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209, where Edgar Joseph Jr FCJ speaking for the Federal Court stated:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention — in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

[41] The period of continuous absence without proper authorisation, whether for six months or any other period, without more, is in our opinion, insufficient to establish the offence of desertion. At best, it is evidence in

support of the offence of AWOL. But, that was not the charge against the appellant. The charge was for desertion, that is absence from duty with specific intention as defined in s 54(2)(a). Clearly, that requisite intention was not established.

[42] The respondent has also erroneously relied on the decision of *R v Mahoney* [1956] 3 All ER 799 as authority for the proposition that the court-martial is justified in drawing an inference that an accused did not intend to return to duty by the 'ample time' during which an accused is absent from his unit; that the fact there was a long period of absence, the reasonable inference is that the appellant intended to permanently remain absent from duty. Since there were no questions asked of the appellant relating to or for the purpose of establishing the intention to desert, the respondent was in no position to draw any inference, let alone a reasonable inference of a positive intention to desert.

[43] It is further unclear if the inference drawn was the presence of an intention to desert that subsisted at the time of leaving or was only formed subsequently. In a charge as serious as desertion which carries not only a punishment of a period of imprisonment but a dishonourable discharge from His Majesty's Service, there should be clear precise findings and not a matter of guesswork.

[44] The charge against the appellant under s 54(1)(a) read with s 54(2)(a) has clearly not been made out. On the face of the record, we find that the decision of the respondent does not accord with the terms prescribing the offence of desertion under ss 54(1)(a) and (2)(a). Such a decision is evidently unsustainable in law and must be quashed.

[45] We are therefore constrained to answer the third question of law posed in the negative. This is sufficient to dispose of the appeal and we do not need to answer questions 1 and 2.

CONCLUSION

[46] With these reasons, we therefore allow the appeal with costs and we set aside the orders of the courts below. We further grant the order of certiorari in the terms as sought in prayer (1) in encl 1 filed at the High Court.

Appeal allowed; third leave question answered in the negative; orders of the courts

below set aside; and order of certiorari sought by the appellant in his judicial review application allowed.

Reported by Ashok Kumar